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6 IN THE UNITED STATES DISTRICT COURT
7
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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10 COLIN FRASER, individually and on
behalf of all others similarly situated,

No. C 12-00652 WHA

11 Plaintiff,

12 v.

**ORDER RE SECOND MOTION
FOR PRELIMINARY APPROVAL
OF SETTLEMENT AND
VACATING HEARING**

13 ASUS COMPUTER INTERNATIONAL,
14 a California Corporation, and ASUSTEK
COMPUTER, INC., a Taiwanese
15 Corporation,

16 Defendants.
_____/

17
18 **INTRODUCTION**

19 In this putative consumer class action brought on behalf of consumers who purchased
20 defendants Asus Computer International and Asustek Computer, Inc.'s tablet computer, plaintiff
21 has filed a renewed motion for conditional certification of a class for settlement purposes and
22 preliminary approval of the settlement. For the reasons stated below, the motion is **GRANTED**.

23 **STATEMENT**

24 This action was filed by plaintiff Colin Fraser on behalf of himself and all other
25 United States residents who purchased an Asus Transformer Prime Eee TF201 Tablet. The facts
26 have been set forth in previous orders (see Dkt. No. 61) and need not be repeated here. Briefly,
27 the complaint alleges that the TF201 tablet contains a defect that results in loss or reduction
28 in global positioning system ("GPS") and wireless ("Wifi") functionality.

1 By order dated December 21, 2012, plaintiff's unopposed motion for preliminary approval
2 of a settlement and certification of a settlement class was denied (Dkt. No. 61). The order noted
3 several deficiencies with the proposed settlement, including the fact that all class members would
4 be bound by the settlement, even if they had not timely received notice or submitted a claim form.
5 Another concern was the proposed form of notice, which was to be accomplished primarily via a
6 "push" notification sent by Asus to the TF201 devices themselves.

7 Following denial of the first motion for preliminary approval, the parties continued
8 settlement discussions under the supervision of Magistrate Judge Jacqueline Corley. Plaintiff has
9 now filed a new motion for certification of a class for settlement purposes and preliminary
10 approval of a revised class action settlement. Defendant has filed a statement of non-opposition
11 in support of the proposed settlement. Defendant further contends that because the proposed
12 settlement is on a claims-made basis, and plaintiff's counsel has agreed not to seek attorney's fees
13 beyond its actual and reasonable fees and costs, there is no need for a final fairness hearing. For
14 the reasons stated below, the motion is, to the following extent, **GRANTED**. The hearing
15 scheduled for February 21 is **VACATED**.

16 ANALYSIS

17 1. CERTIFICATION OF A SETTLEMENT CLASS.

18 "A party seeking class certification must affirmatively demonstrate his compliance with
19 [Rule 23] — that is, he must be prepared to prove that there are *in fact* sufficiently numerous
20 parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131
21 S. Ct. 2541, 2551 (2011) (emphasis in original). In determining whether class certification is
22 appropriate, the party seeking class certification bears the burden of showing that each of the four
23 requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. *See*
24 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019–22 (9th Cir. 1998). Pursuant to Rule 23(a), for a
25 named plaintiff to obtain class certification, a court must find: (1) numerosity of the class; (2)
26 that common questions of law or fact predominate; (3) that the named plaintiff's claims and
27 defenses are typical; and (4) that the named plaintiff can adequately protect the interests of the
28 class. In the instant case, plaintiff seeks to certify a class under Rule 23(b)(3). Certification

1 under Rule 23(b)(3) requires that the court find “that the questions of law or fact common to class
2 members predominate over any questions affecting only individual members, and that a class
3 action is superior to other available methods for fairly and efficiently adjudicating the
4 controversy.”

5 Counsel seeks to certify a class comprised of all United States residents who purchased an
6 Asus TF201 tablet between December 1, 2011, and February 19, 2013, and who have not already
7 returned their device for a full refund.

8 **A. Rule 23(a)(1): Numerosity.**

9 The numerosity requirement of Rule 23(a)(1) is satisfied when joinder of individual
10 plaintiffs would be impracticable. The parties jointly retained an expert, Dr. Hanssens, to
11 evaluate the value of the GPS functionality to TF201 users. Dr. Hanssens reported that, based on
12 sales data provided by Asus, net sales (accounting for returns) through May 2012 was 133,306
13 devices (Hanssens Decl., Exh. C). This order finds that plaintiff has satisfied its burden regarding
14 numerosity.

15 **B. Rule 23(a)(2): Commonality.**

16 A class has sufficient commonality under Rule 23(a)(2) if “there are questions of law or
17 fact common to the class.” Rule 23(a)(2) does not require each member in a class to have
18 identical factual and legal issues surrounding his or her claim. “The existence of shared legal
19 issues with divergent factual predicates is sufficient” to meet the requirements of Rule 23(a)(2).
20 *Hanlon*, 150 F.3d at 1019. Here, the claims of each class member regarding the GPS and Wifi
21 functionality of the TF201 product and Asus’ liability therefor are common to the class.
22 Accordingly, this requirement is satisfied.

23 **C. Rule 23(a)(3)–(4): Typicality and Adequacy.**

24 The typicality requirement of Rule 23(a)(3) is satisfied when “the claims or defenses of
25 the representative parties are typical of the claims or defenses of the class.” A plaintiff’s claims
26 are typical if they “are reasonably co-extensive with those of absent class members; they need not
27 be substantially identical.” *Hanlon*, 150 F.3d at 1020.
28

1 Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect
2 the interests of the class.” Determining whether the representative parties will do so involves two
3 inquiries: (1) do the named plaintiff and his counsel have any conflicts of interest with other class
4 members, and (2) will the named plaintiff and his counsel act vigorously on behalf of the class?
5 *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Accordingly, “a
6 class representative must be part of the class and possess the same interest and suffer the same
7 injury as the class members.” *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403
8 (1977) (citations and quotation marks omitted).

9 Named plaintiff Colin Fraser is a consumer who purchased the device at issue. His claims
10 arise from the same factual bases applicable to all class members, namely an alleged defect in the
11 TF201 that resulted in poor GPS and/or Wifi functionality.

12 Declarations of plaintiff’s counsel Attorneys Mark Dearman and Seth Lehrman establish
13 that counsel has investigated and prosecuted this case to effectively advance the interests of class
14 members (Dkt. Nos. 46-2 and 46-3). The parties represent that counsel for plaintiff have received
15 discovery from Asus regarding sales, refunds, repairs, and customer complaints related to the
16 TF201; Asus has also provided documentation that demonstrates that Wifi functionality in the
17 TF201 is acceptable in comparison to other tablet devices. Plaintiff and his counsel thus satisfy
18 the typicality and adequacy requirements of Rule 23.

19 **D. Rule 23(b)(3): Predominance.**

20 The predominance requirement of Rule 23(b)(3) is more stringent than the commonality
21 requirement of Rule 23(a)(2). The analysis under Rule 23(b)(3) “presumes that the existence of
22 common issues of fact or law have been established pursuant to Rule 23(a)(2).” In contrast,
23 “Rule 23(b)(3) focuses on the relationship between the common and individual issues.” Class
24 certification under Rule 23(b)(3) is proper when common questions present a significant portion
25 of the case and can be resolved for all members of the class in a single adjudication. *Hanlon*, 150
26 F.3d at 1022. In addition, Rule 23(b)(3) asks whether the class action device would be “superior
27 to other available methods for fairly and efficiently adjudicating the controversy.” As discussed
28 above, the claims of the class members regarding the particular functionality of the TF201 device

1 at issue here are the same. Moreover, a class action is a superior method for adjudicating this
2 action, as “recovery on an individual basis would be dwarfed by the cost of litigating on an
3 individual basis.” *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168, 1175 (9th Cir.
4 2010).

5 **2. REVISED SETTLEMENT AGREEMENT.**

6 “A settlement should be approved if ‘it is fundamentally fair, adequate and reasonable.’”
7 *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (citation omitted). Many
8 different factors may predominate in different factual contexts. *Ibid.* The key terms of the
9 revised settlement agreement are:

10 *First*, the proposed settlement class would include all United States residents who
11 purchased an Asus TF201 tablet between December 1, 2011, and the date of any preliminary
12 approval of the settlement, and who have not previously returned the device for a full refund. The
13 class would exclude Asus and its directors, officers, and employees, as well as entities controlled
14 by Asus.

15 *Second*, class members could apply for a cash payment of seventeen dollars and a free
16 GPS dongle, the same dongle already offered for free by Asus. In order to receive the money
17 and/or dongle a class member would have to timely fill out and submit a valid claim form. The
18 time period for filing claims would be limited to 60 days after the sending of notice.

19 *Third*, and most significantly, the settlement agreement would bind only those class
20 members who timely submitted a valid claim form. Pursuant to the revised settlement agreement,
21 class members who either did not exclude themselves or did not timely submit a valid claim form
22 would still retain the right to sue and would not be bound by the release.

23 *Fourth*, the parties propose to provide notice to the class by (1) maintaining a settlement
24 website and a toll-free number through which the notice and claim form can be obtained,
25 (2) publishing a short summary notice on Asus’s website and Facebook page, (3) mailing the
26 notice to individuals for whom Asus has mailing information (constituting an estimated thirty
27 percent of the class), and (4) providing a “push” notification directly to TF201 devices through an
28 electronic notification system. The “push” notice would show up as an icon on a user’s TF201

1 tablet screen. Asus describes the proposed push notice as being similar to notifications that Asus
2 and third-parties send to the TF201 and other Android-based mobile phone and tablet devices
3 (Liu Decl. ¶¶ 12-14). Asus would bear the cost of providing notice.

4 *Fifth*, counsel for plaintiff has agreed to waive any claim to an award of attorney's fees
5 and will only seek reimbursement of litigation expenses and costs actually and reasonably
6 incurred, in an amount not to exceed \$45,000.

7 As discussed above, only those class members who submit a timely, valid claim form will
8 be bound by the release. Class members who do not submit a claim form are free to pursue their
9 own claims. Class members who do timely submit a valid claim form within the 60-day claims
10 period would be eligible to receive a seventeen-dollar cash payment and could also request a free
11 GPS dongle, which Asus claims addresses problems with GPS performance. According to the
12 parties' jointly retained expert, Dr. Hanssens, this amount is at the high end of the value of the
13 GPS functionality. Asus has also produced to plaintiff information regarding the Wifi
14 performance of the TF201 tablet, which it claims is within an acceptable range.

15 Accordingly, the Court **ORDERS** that notice be sent out to class members. The notice form
16 and the claim form should be revised to clearly state the scope of the release. Under the notice
17 form section titled "Objecting to the proposed settlement," the following sentence should be
18 removed: "Remember, however, that unlike most other class actions, your rights are only
19 impacted if you choose to participate, and Class Counsel has decided not to seek any fee for its
20 representation." Additionally, the notice form should clearly state that a class member may object
21 to the settlement, even if he or she did not submit a claim form, by mailing a written objection
22 with the required information by the deadline set forth below and by appearing at the final hearing
23 to object.

24 **3. WAIVER OF FINAL FAIRNESS HEARING AND OBJECTIONS.**

25 Defendant has filed a statement in support of preliminary approval of the settlement
26 agreement as providing a substantial benefit to class members. Defendant contends, however,
27 that no class member would have standing to object to the settlement. This is presumably
28 because plaintiff's counsel are not seeking attorney's fees above and beyond their actual fees and


1 costs and because a class member who does not opt in (by timely submitting a valid claim form)
2 cannot argue that he or she was injured by any part of the settlement agreement. Defendant,
3 however, has entered into a settlement agreement that calls for seeking certification of a
4 settlement class, distribution of a notice form stating that it has been authorized by this Court, and
5 requesting that this Court retain jurisdiction to oversee and enforce the settlement agreement, at
6 least until final approval is given. To the extent that the parties seek to use this Court to continue
7 litigating this action and for the orderly administration of their proposed settlement agreement,
8 this Court will require that appropriate procedures be followed to protect the rights of class
9 members. If the parties prefer to settle the case as between the individual plaintiff and defendant,
10 they are free to do so. They have not. Defendant's request to waive a final fairness hearing or
11 opportunity to object is **DENIED**.

12 CONCLUSION

13 For the reasons stated above, the motion for preliminary approval of the revised settlement
14 agreement is **GRANTED**. Notice shall be published and sent out by **MARCH 11, 2013**. A motion
15 for final approval should be filed by **MAY 9, 2013**. Any objections must be in writing and
16 postmarked by **MAY 20, 2013**. A final fairness hearing is set for **JUNE 13, 2013 AT 2:00 P.M.** The
17 notice must be revised to reflect these dates. The hearing scheduled for February 21 is hereby
18 **VACATED**.

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20 **IT IS SO ORDERED.**

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22 Dated: February 19, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE